United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with affidavit of mailing

74-2070

To be argued by
PAUL F. CORCORAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2070

UNITED STATES OF AMERICA,
Appellee,

—against—

HARVEY BONNER and BOBBY TARVER,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2070

UNITED STATES OF AMERICA,

Appellee,

—against—

HARVEY BONNER and BOBBY TARVER,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Harvey Bonner and Bobby Tarver appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York, convicting them, after a jury trial before the Honorable Jack B. Weinstein, of four counts of possessing and distributing heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21, U.S.C. § 841(a)(1).

Appellant Tarver was sentenced on July 29, 1974, to five years plus a five year special parole term, to run concurrently with a prior unrelated federal sentence which he began serving in March of 1974.

The following day, on July 30, 1974, Bonner was sentenced to six years imprisonment plus a six year special parole term on each of the four counts, to run concurrently. He was additionally fined $10,000. Appellants are free on bail pending appeal.

On this appeal, appellants do not question the sufficiency of the evidence against them; rather they challenge (1) the District Court's ruling limiting cross-examination of a prosecution witness during the pre-trial suppression hearing; (2) the District Court's evidentiary ruling permitting testimony as to appellant Bonner's statements with regard to appellant Tarver's cocaine snorting during the transactions; and (3) the prosecutor's summation.

Statement of Facts

(1)

At trial, Kendall Feurtado, a New York City police officer assigned to the Drug Enforcement Administration Task Force (DEA), testified to the following undisputed facts.

At approximately 6:30 P.M. on October 25, 1973, Officer Feurtado, while working in an undercover capacity under the name "Frenchy," was introduced to the appellant Bonner by a confidential informant (I-58, 59).* Feurtado's purpose in attending the pre-arranged meeting with Bonner was to purchase narcotics (II-26, II-33). During the ensuing conversation, which took place at a Brooklyn gas station which Bonner was then managing, the informant told Bonner that Officer Feurtado, or "Frenchy", was a "friend," "closely related to the family," who "was interested in purchasing narcotics" (II-19, II-25).

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* Unless otherwise specified, parenthetical page references are to the trial transcript. As a result of the failure of the Court Reporter to consecutively paginate the entire transcript, page references will necessarily be referred to by the volume of transcript: the morning session dated June 20, 1974 denominated volumes I and II respectively; the afternoon session dated June 20, 1974 denominated volume III; and the morning session of June 21, 1974 denominated volume IV.

Shortly thereafter, appellant Tarver appeared at the garage. After a brief conversation with Bonner on the outside lot, Tarver entered the "stall" or "bay" area of the garage. Bonner then told Feurtado to follow Tarver, stating 'he has the package" (I-60, 61). With that, Officer Feurtado and the informant entered the garage. Almost immediately, and without explanation, Tarver stopped, turned around, and left the garage, having a short conversation with appellant Bonner on the way out (I-60).

After Tarver left the garage, Bonner approached the undercover agent and explained Tarver's erratic conduct, stating that Tarver had "been snorting cocaine and he forgot the package" (I-67). Bonner then discussed with Feurtado the price and quality of the heroin to be purchased, stating that it would be $1,400 for the one ounce "package", and that it would take a "three and a half to four" cut (I-67).

Upon returning, Tarver had another brief conversation with Bonner before re-entering the bay area of the garage. Bonner then motioned for Feurtado and the informant to follow Tarver to a room in the rear of the garage, but remained outside himself. Once in the back room, Tarver produced a plastic bag containing a brownish-white substance, which was subsequently analyzed by a government chemist and found to be heroin (II-66). Feurtado introduced himself to Tarver as "Frenchy," and paid Tarver $1400 in Official Advance Funds for the package, which was handed to him by Tarver, before leaving the garage (I-68, 69).

Officer Feurtado testified that he had further narcotics dealings with Bonner, meeting with him on three occasions in November, 1973 and twice in January, 1974. He stated that he approached Bonner at the same Brooklyn garage on November 1, 1973 and inquired as to the price of "a half an eighth" of a kilogram of heroin (approxi-

mately two ounces). Bonner told him that any amount less than an "eighth of a kilo" would be $1400 an ounce, but that he could get an "eighth" (approximately four ounces) for $4800 (I-72, 74). Bonner advised Feurtado that he would be away for a few days but would be returning the following week.

After unsuccessfully attempting to purchase additional heroin from appellants on November 6, 1973, Officer Feurtado returned to the gas station at an appointed time on November 7th. Bonner, who was playing cards with three unidentified individuals in the station office at the time of Feurtado's arrival,* told him that "the package will be here in ten minutes" (I-75). Shortly thereafter, Tarver arrived on the scene, at which time Bonner accompanied Tarver and the undercover agent into the room at the rear of the stall area. When they reached the back room, Bonner told Tarver to get the package and Tarver again left the premises (I-76). While Tarver was away, Bonner asked Feurtado to advance the $4800, but the officer declined (I-76, 77). A few minutes later Tarver returned, at which point the three of them repaired to the rear room where the sale was consummated. Tarver produced an eighth of a kilo of heroin, for which Bonner accepted $4800 in Official Advance Funds (I-78-80).

Officer Feurtado then testified as to the further negotiations with Bonner in January of 1974, at which time he unsuccessfully attempted to purchase another eighth of a kilo of heroin. He stated that he met with Bonner on January 7, 1974 and for the last time on January 11th, and that on each occasion Bonner said he was "bone dry" (I-83, 84). At the last meeting Feurtado gave Bonner

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* Parenthetically, it should be noted that on cross-examination Detective Ronald Stanley, a surveillance agent, testified that during two months of surveillance of the gas station Bonner was "managing," he observed no gasoline being purchased or pumped (IV-59).

a slip of paper containing his phone number and name—"Frenchy" (I-84-87).

The testimony of undercover agent Feurtado was corroborated at trial by the testimony of two surveillance officers, New York City Detectives Arthur Drucker and Ronald Stanley, also assigned to the DEA Task Force, who respectively observed Feurtado dealing with the appellants on October 25, 1973 and November 7, 1973 (III-70-IV-63). Detective Stanley additionally testified as to Bonner's arrest on January 21, 1974, and to a post-arrest, false exculpatory statement he made when confronted with the piece of paper containing the phone number and the name of "Frenchy" which had been found in his wallet at the time of his arrest (IV-49).*

(2)

Prior to trial, Bonner's trial counsel moved to suppress his post-arrest admissions on the ground that he had not been given his *Miranda* ** warnings. At the pre-trial suppression hearing held pursuant to that motion, Detective Stanley testified that Bonner's statements, in which he admitted arranging the two heroin sales to Feurtado and accepting the money therefrom, had been made after Bonner had twice received his *Miranda* warnings, and after he had, in fact, executed a waiver of rights form.

Bonner took the stand at the suppression hearing and denied ever receiving his constitutional rights from Detective Stanley (I-31). When confronted with his ex-

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* When confronted with the piece of paper containing Officer Feurtado's street name and telephone number, appellant claimed "Frenchy" was a friend of his, a race car driver. When Feurtado then appeared and identified himself as a police officer, appellant made the post-arrest admission which was the subject of the pre-trial suppression hearing (I-13-15).

** *Miranda* v. *Arizona*, 389 U.S. 436 (1966).

ecuted waiver of rights form, he admitted the signature thereon was his (I-34, 37) but denied reading the form before he signed it (I-33).

In denying appellant's suppression motion, Judge Weinstein found, "beyond a reasonable doubt," that Bonner had been advised of his rights, and that his statements were given voluntarily (I-39). The Court found, however, a substantial *Bruton** problem, inasmuch as Bonner's statement substantially implicated Tarver, which problem, the Court ruled, could not be resolved by redaction (I-40). Upon Tarver's motion for a severance and a mistrial,** the Government stipulated that it would proceed without offering Bonner's admissions in evidence—thus avoiding the *Bruton* problem. The admissions which were the subject of the suppression hearing were therefore never introduced in evidence at the trial.

ARGUMENT

POINT I

The District Court properly limited the scope of cross-examination at the pre-trial suppression hearing.

Appellant Bonner initially contends that he was denied a substantial right when the District Court limited cross-examination of the prosecution witness at the pre-trial suppression hearing to the scope of the hearing—i.e. to questions concerning the voluntariness of the appellant's admissions. Citing *Alford* v. *United States*, 282 U.S. 687 (1931), appellant claims that it is prejudicial error to in any way curtail a defendant's right to cross-examine. Such argument is patently without merit.

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* *Bruton* v. *United States*, 391 U.S. 123 (1968).

** The jury had been selected before defense counsel made their suppression motions.

While the right of an accused to cross-examine witnesses against him is recognized as an essential and fundamental element of a fair trial, *Chambers* v. *Mississippi,* 410 U.S. 284, 295 (1973); *Smith* v. *Illinois,* 390 U.S. 129 (1968); *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Alford* v. *United States, supra,* it is clearly not without limitation. It is well established that the scope and extent of cross-examination lie within the sound discretion of the trial court, *Alford* v. *United States, supra,* 282 U.S. at 694; *United States* v. *Mahler,* 363 F.2d 673, 678 (2d Cir. 1966); *United States* v. *Rich,* 262 F.2d 415, 419 (2d Cir. 1959), the appellate burden with regard to an adverse ruling being thus on the appellant to show an abuse of discretion on the part of the trial court. Moreover, as the *Alford* court implied, the right of cross-examination is always limited to "an appropriate subject of inquiry" 282 U.S. at 694.

Appellant Bonner concedes that the sole issue at the pretrial suppression hearing was the voluntariness of his post-arrest admissions. Indeed the cross-examination at the hearing focused mainly on the circumstances of appellant Bonner's arrest and the giving of the *Miranda* warnings. It is alleged, however, that the District Court erroneously restricted defense counsel to that issue when it disallowed the following line of questioning on cross-examination of Detective Stanley:

> Q. Did you say that you were present at the time of the transfer of funds in this case? A. I was on surveillance, yes.
>
> Q. And do you know if any of this money was marked? Were there any photographs taken of the transaction? (27)

The Government submits that the District Court properly exercised its discretion in disallowing such questions. In attempting to use the suppression hearing as a discovery device with regard to the underlying substantive charge, defense counsel improperly posed questions which

were irrelevant to the issue of voluntariness and, as such, were not "an appropriate subject of inquiry" at the pretrial hearing. *Alford* v. *United States, supra.*

Finally, as noted above, the admissions which were the subject of the suppression hearing were never introduced in evidence at the trial. Although Judge Weinstein found the statements to be voluntary and thus admissible against Bonner, *Bruton* problems (see, e.g., *United States* v. *Glover*, — F.2d —, 2d Cir. slip opinions, 33; decided October 4, 1974) with regard to co-defendant Tarver precluded use of the Bonner admissions at a joint trial. Accordingly, appellant Bonner can claim no prejudice as a result of any alleged irregularities at the suppression hearing.

POINT II

The District Court properly admitted appellant Bonner's statement explaining his co-defendant's actions.

Both appellants contend that the District Court erroneously admitted testimony of Officer Feurtado as to a statement made by Bonner contemporaneously explaining that the reason co-defendant Tarver initially exited the gas station on October 25, 1973 without delivering the heroin was that he had been "snorting" cocaine and had forgotten the package. While not raised by trial counsel below, it is argued on appeal that the prejudicial effect of such testimony outweighed its probative force.

At trial, counsel objected to the admission of Bonner's statement on hearsay grounds. The District Court overruled their hearsay objection, holding that Bonner's statement was made by a co-conspirator during the course of, and in furtherance of the conspiracy. See *Krulewitch* v. *United States,* 336 U.S. 440 (1949). Appellants do not challenge that ruling on this appeal.

In a *sua sponte* ruling after completion of the side bar conference on defendants' hearsay objections, and without further objection having been raised, Judge Weinstein further ruled, in the exercise of his discretion, that the probative force of Bonner's statement was greater than its prejudicial effect since it was "necessary for the jury to understand what was going on among these parties" (I-65). The District Court's ruling was well-founded and should be upheld.

While evidence of other crimes may not be admitted merely to show a defendant's criminal proclivities, it is well established that such evidence may be admitted, in the discretion of the trial court, where relevant for some other legitimate purpose. *United States* v. *Purin*, 486 F.2d 1363, 1367 (2d Cir. 1973), *cert. denied*, — U.S. —, 94 S. Ct. 2640 (1974); *United States* v. *Wright*, 466 F.2d 1256, 1258 (2d Cir. 1972), *cert. denied*, 410 U.S. 916 (1973); *United States* v. *Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). In the instant case, Bonner's statement concerning Tarver's cocaine-snorting, while possibly evidencing other criminal involvement, was relevant and necessary to explain the activities of the parties on October 25th, as they would be testified to by both Officer Feurtado and surveillance officers. The District Court, therefore, properly exercised its discretion in admitting Bonner's statement.

POINT III

The prosecutor's closing remarks were fair and proper.

Appellant Bonner's final contention is totally frivolous. It is argued that the prosecutor became an unsworn witness as to the motives for the delayed arrest of the defendants when, in response to arguments made by defense counsel during their summations, the prosecutor offered the following argument:

> Why did the arrest take place in January and not November or October? Because, as Officer Feurtado

testified, he had further negotiations with these defendants or with Bonner.

Mr. Cutler: If your Honor please, I object to that statement.

The Court: I don't recall that, but you can argue hypothetically, if you wish.

Mr. Corcoran: Officer Feurtado testified that after the November 7th purchase of drugs he again met with Mr. Bonner on January 7th, that he asked Mr. Bonner, have you got anything, got anymore, I would like to buy an eighth. It's your recollection that is important, but if you think back to the testimony Mr. Bonner said to Mr. Feurtado, "I haven't got anything, try me next week."

On January 11th, the undercover agent again met with Mr. Bonner and sought another purchase. There were continuing negotiations, there was an attempt to purchase more drugs. Thus there were not arrests in October or November. That is why there was no marked money in the pockets of the defendants when they were arrested. That's why it would do no good to sprinkle the money with any kind of powder that would show up under ultra-violet rays. There was no intention on the part of the police to arrest these men at the time of the first or second sale (IV-79, 80).

The question of motivation for the delayed arrest of the appellant Bonner had been first raised during his counsel's summation when the following argument was posed:

Why was there no arrest made on that first day that Feurtado claimed he was introduced to Mr. Bonner and that he was some sort of a traffic engagement at that day, that he got some bundle from somebody? Why was there no arrest the second time in the

> same location, and the police were aware of everything that was going on? It was only weeks and weeks later that the defendant was picked up (IV-56).

Testimony in the record evidenced continued undercover dealings with the appellants from October 25, 1973 through January 11, 1974. Only after January negotiations proved fruitless was Bonner arrested on January 21, 1974. Such evidence clearly permitted a jury inference as to the reason for the failure of the agents to arrest the appellant during October or November, 1973; and it was that inference which the District Court properly permitted the prosecutor to argue "hypothetically" during his summation.

Moreover, defense counsel had ample opportunity during cross-examination of Detective Stanley, the arresting officer, to raise any question as to said motivation. Having failed to question the arresting officer with regard to that issue, defense counsel raised the issue for the first time during his summation. The prosecutor's response thereto, being based upon evidence in the record, see *United States* v. *DeAngelis*, 490 F.2d 1004, 1008 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974) was therefore fair rejoinder. *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

Dated: December 13, 1974

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERMAN,
PAUL F. CORCORAN,
Assistant United States Attorneys,
Of Counsel.

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_____ Action No._____

UNITED STATES DISTRICT CO
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

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